BANK BUMIPUTRA MALAYSIA BERHAD

v.

AZLAN BIN HASHIM

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. D5-22-1060-92]
1 DECEMBER 1993

PRACTICE & PROCEDURE: Claim for recovery of loan - Amicable settlement - Plaintiff withdrawing action without liberty to file afresh - Whether plaintiff barred from filing similar action - Estoppel and res judicata - Whether applicable - Application for striking out - Rules of the High Court 1980 O. 18 r. 19(1).

This was an application by the defendant under O. 18 r. 19(1) RHC to strike out the plaintiff's suit claiming from the defendant RM956,111.28 on the grounds, *inter alia*, that it disclosed no reasonable cause of action, was scandalous, frivolous or vexatious and that it was otherwise an abuse of the process of the Court.

The plaintiff had instituted two seperate actions against the defendant in the defendant's capacity as guarantor to a certain loan facility granted by the plaintiff to one Lanza Sdn Bhd in 1981 amounting to RM450,000 with interest. By it's first action, filed on 6 December 1985, the plaintiff claimed from the defendant RM750,673.69, being the outstanding sum payable then on the said loan. The ensuing correspondence between the parties showed however that the plaintiff agreed to withdraw the action subject to the defendant paying RM450,000 only of the claimed sum and this proposal, apparently, led to a consent settlement of the suit which in turn led to the Court making an order on 22 July 1987 that "the action against the defendant be struck off". There was then no liberty asked for or granted to file afresh.

The evidence showed that the defendant had fully paid the RM450,000 though the plaintiff put that to issue by saying that they had been paid only RM425,000. The plaintiff however contended further that they had never agreed in the correspondence that the liability limit of the defendant in respect of the loan was RM450,000 and that as far as they were concerned the amount owing as at 31 May 1992, excluding the " RM425,000", was RM956,111.28. They thus filed a second claim against the defendant to recover the said sum. Of necessity, this claim was based on the same facts as the claim in the first suit.

The main issue that arose was whether in the circumstances and by virtue of *estoppel* and *res judicata*, the plaintiff was estopped from proceeding with the second claim aforesaid.

Held:

[1] Taking the relevant correspondence between the parties as a whole, and if it is true that the arrangement was to be reviewed every six months and the liability limit was not agreed to, as the plaintiff contended, it certainly is more prudent of the plaintiff not to make the application to withdraw their action the way they did on 22 July 1987. But even so, it was not wrong for them to so apply, provided they also asked for liberty to file afresh as the withholding of the action was only for the purpose of seeing that all payments promised were being made. This the plaintiff did not do and the result is that they cannot now file a similar action based on the same facts.

[2] As the plaintiff's claim had been fully litigated as against the defendant and cannot be raised again on the principles of *estoppel* and *res judicata*, this claim therefore discloses no reasonable cause of action, is scandalous, frivolous and vexatious and is otherwise an abuse of the process of the Court.

[3] The defendant had satisfactorily proven that RM450,000 had in fact been paid. Notwithstanding that, since the plaintiff contends that only RM425,000 had been received, the plaintiff is given the liberty to file for the disputed balance if they so wish.

[Application granted].

Cases listed at the end of the judgment as "Cases referred to":

The Owners of the Cargo of the "Kronprinz" v. The Owners of the "Kronprinz" [1887] AC 256
Hopkins v. Hopkins [1914] Probate 282
Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor. [1984] 2 MLJ 105

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d)

For the plaintiff - Shanti Nair; M/s. Akhir & Partners
For the defendant - K.S. Chong; M/s. Tay, Tee & Nasir

JUDGEMENT

Haji Abdul Malek bin Haji Ahmad J:
The summons in chambers filed on 23 December 1992 by the defendant is to strike out the plaintiff's statement of claim on the grounds that it discloses no reasonable cause of action, is scandalous, frivolous or vexatious, or it is otherwise an abuse of the process of the Court, under O. 18 r. 19(1)(a), (b) and (d) of the Rules of the High Court 1980, and under the inherent jurisdiction of this Court.

The defendant had been sued as guarantor to a fixed loan facility taken out by Lanza Sdn. Bhd. (hereinafter "Lanza") from the plaintiff for RM450,000. The offer letter is dated 24 October 1980. The defendant had signed the relevant letter of guarantee on 19 May 1981.

According to the plaintiff's statement of claim, the defendant had paid RM425,000 leaving a balance of RM956,111.28 as at 31 May 1992. The plaintiff is claiming for this balance together with interest at 11.75 per cent per annum on monthly rests from 1 June 1992 until the date of judgment and thereafter at 8 percent per annum until full realisation and costs.

In line with the supporting affidavit to the said application sworn by the defendant, his learned Counsel had reiterated that the plaintiff had in fact filed a civil suit namely Kuala Lumpur High Court Civil Suit C24-714-86 on 6 December 1985 against Lanza and three others, including the defendant, as guarantors for RM750,673.69, interest at the agreed rate of 15.25 per cent per annum for 30 November 1985 to the date of actual realisation, RM200 for costs of issuing the legal notice of demand, RM3,000 for solicitor and client costs, and costs. That suit was based on the same facts as in the present case.

As for the defendant here in that case, the affidavit had stated that it had been agreed that the other suit would be withdrawn against him on condition that he paid the plaintiff there RM450,000 payable by monthly instalments of RM15,000 each in full and final settlement in respect of the defendant's liability in the matter. The defendant had duly exhibited the relevant correspondence and the details of the monthly payments he had made which had amounted to RM450,000 the last payment of RM40,000 having been enclosed in the defendant's letter dated 2 May 1990.

It is crucial to go through the correspondence exhibited by the defendant to grasp how the whole problem has started. By letter dated 22 November 1985, the plaintiff's solicitors had sent a notice of demand to the four defendants in the earlier suit asking for RM375,000 together with interest at 15.25 percent per annum and RM200 for costs of issuing the notice. The defendant here had on 2 May 1986 proposed an immediate payment of RM50,000 which was enclosed and the balance of RM400,000 by sixteen quarterly instalments of RM25,000.

This was rejected by the plaintiff in their letter dated 19 May 1986. They had instead asked for RM200,000 immediately, in addition to the RM50,000 paid, before legal proceedings could be withheld, and the remaining balance was to be settled by RM15,000 monthly instalments within a period of four years. It must be observed that the calculation for the balance cannot be correct as the amount demanded was only RM375,200. The plaintiff's next letter dated 18 June 1986 confirmed another miscalculation on their part as they had regretted that the RM200,00 to be paid in addition to the RM50,000 had not been paid and they had asked for the balance of RM150,000 within two weeks. This would have brought the total amount due to RM400,000. The defendant who had replied on 25 June 1986 referred to the plaintiff's two letters but stuck to his original proposal in his letter dated 2 May 1986.

The plaintiff had responded by a letter dated 23 July 1986 rejecting that proposal and demanding an immediate payment of RM200,000 and the remaining balance to be paid by monthly instalments of RM15,000 subject to a revision every six months. The next letter dated 8 May 1987, before the hearing of the earlier suit on 11 June 1987, was from the defendant who had proposed a monthly instalment of RM15,000 which was duly enclosed, who had promised to withdraw his defence in the said suit and who had agreed that the plaintiff could keep the action in view as long as the monthly payments were made.

The lettter from the plaintiff dated 11 May 1987 states:

> We refer to your letter dated 8 May 1987 and pleased to advise that your proposal to pay RM15,000 per month is accepted on a without prejudice basis and it is to be reviewed in 6

months. However, legal action against you will be withheld after your lawyer has withdrawn the defence.

This was closely followed by a letter from the plaintiff's solicitors to the defendant's solicitors on 20 May 1987 where the third paragraph reads:

STRICTLY ON A WITHOUT PREJUDICE BASIS, our client will accept such proposal only if your client agree to enter consent judgement.

This apparently had resulted in the order made on 22 July 1987.

The plaintiff in their statement of claim at paragraph 7 had agreed that the defendant had paid RM425,000 as at 31 May 1992 and had restated so in their letter to the defendant on 21 June 1990 but had added:

However, the bank after due consideration of your request had agreed to accept a further sum of RM660,000 (Ringgit: Six Hundred and Sixty Thousand Only) as full and final settlement of the borrower's loans to be paid by way of monthly instalments of RM20,000 effective from 30 June 1990. The bank shall review the monthly instalment every six (6) months.

As for the earlier suit, the order on 22 July 1987 had stated that "It Is Ordered that the action against the 2nd defendant (the defendant here) herein be struck off with no order as to costs'. This confirms the defendant's story that the matter had been settled by the promise of the mode of payments to be made by him and the plaintiff's acceptance of that promise. There was no liberty asked for or granted to file the earlier suit afresh.

Learned Counsel for the plaintiff had argued that the correspondednce showed that the plaintiff had never agreed that the liability limit was RM450,000 as the matter was to be reviewed every six months. As far as the plaintiff was concerned, the amount owing was RM956,111.28 which was obviously the result of the accrual of interest over the years. She further submitted that *estoppel* and *res judicata* were not applicable and a literal meaning cannot be given to the relevant Court order, which was not a consent judgment, in the light of the correspondence. She added that a full trial was necessary to determine the issue on the grounds that as long as the statement of claim disclosed some ground of action, the mere fact that the plaintiff was unlikely to succeed at that trial was not a ground for striking out.

As for the Court, it was of the view that the relevant correspondence had to be taken as a whole and not each letter *per se*. After all these letters had been written, it was more appropriate and prudent to expect the plaintiff not to make any oral application to the Court to withdraw that action, as they had done on 22 July 1987, if the arrangement was to be reviewed every six months and the liability limit was not agreed to. Even so, it was still not wrong for them to apply the way they did, provided they had asked for liberty to file afresh as the withholding of the action was only for the purpose of seeing that all payments promised were being made as promised. And why they did not ask for consent judgement, as stated in their last letter, has not been explained at all. Accordingly, it was my finding that the plaintiff's claim had been fully litigated as against the defendant and it cannot therefore be raised again on the principles of *estoppel* and *res judicata*. The defendant, too, had satisfactorily proven that RM450,000, as agreed between them, had in fact been paid although the plaintiff now contends that only RM425,000 had been received.

On these facts, I could only conclude that the plaintiff is estopped from filing a similar action on the same facts and that this claim discloses no reasonable cause of action, is scandalous, frivolous and vexatious and is otherwise an abuse of the process of the Court. I had accordingly granted the defendant the order in terms of their application with costs but had given the plaintiff the liberty to file for the disputed balance of RM25,000 in the appropriate Court if they wish to.